BINGHAM

July 8, 2013

Via E-Mail

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA-2013-024

Dear Ms. Murphy:

We write to comment on the amendments the Financial Institutions Regulatory Authority, Inc. ("FINRA") proposes to make to its customer arbitration *Discovery Guide and Document Production Lists*. The *Discovery Guide* supplements the discovery rules in the FINRA Code of Arbitration Procedure for Customer Disputes. The proposed changes concern electronic discovery, investment product cases, and party affirmations concerning unsuccessful or partially successful searches for requested documents. Although the amendments were prepared in collaboration with FINRA's Discovery Task Force, and have been reviewed by members of FINRA's National Arbitration and Mediation Committee, they have not previously been subject to public notice and comment.

We are partners in the Financial Institutions Regulatory, Enforcement and Litigation Practice Group of Bingham McCutchen LLP. We have for many years represented FINRA member firms and associated persons in FINRA customer arbitrations (and, before the advent of FINRA, in National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE") arbitrations). In this comment letter we speak on behalf of ourselves and not on behalf of any of our clients.

We applaud FINRA's stated purpose in proposing these amendments: to reduce the number and limit the scope of discovery disputes in customer arbitrations. However, that goal must be tempered, and rules amendments intended to further that goal crafted, so as not to result in unfairness or undue burden for parties in FINRA arbitrations. For that reason we suggest some fine-tuning of the proposed amendments, as set forth below.

E-Discovery. The proposed amendments addressing the form of production for electronic files provide, appropriately, that production in native format is not required in all cases. The amendments state that electronic files must be produced in "reasonably usable format," which can include not only "the format in which a party ordinarily maintains a document," but also "a converted format that does not make it more difficult or burdensome for the requesting party to use during a proceeding." As the Staff notes in its commentary accompanying the proposal, "parties have legitimate reasons" for

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converting documents into different formats, such as the need to redact confidential information. Other reasons could include, for example, cost, burden and the ability to place document control numbers on each document. We also agree that arbitrators should resolve contested motions concerning the form of production on a case-by-case basis, taking into account "the totality of circumstances," including "a party's reason(s) for choosing a particular form of production."

Product Cases. We agree with FINRA's decision not to make product case items presumptively discoverable by adding such items to the *Discovery Guide's* firm/associated person Document Production List. That decision is strongly supported by "the economic impact on firms that is associated with the larger volume of documents in product cases," and the need for flexibility and proportionality in discovery in such cases. We note in this connection that the proposed amendments do not presumptively require any product case-specific production by customer claimants either.

FINRA asserts that "[t]he volume of documents [in product cases] tends to be much greater." That is not always or necessarily the case. The volume of documents relating to product due diligence, post-approval review, and training can vary considerably -- and appropriately so -- based on factors such as the nature of the product and the firm's practices and procedures. Including a reference to a "much greater" volume seems unnecessary, may set unwarranted expectations, and could encourage unduly sweeping discovery requests.

Nevertheless, there likely will be some cases in which documents responsive to product-related requests could be very voluminous, and for this reason we believe the Staff should add language to this portion of the amendments reminding arbitrators that, in deciding whether to compel production of product-specific documents pursuant to a customer's additional document request in a product case, they should take into account the "cost or burden of production," as discussed elsewhere in the *Discovery Guide*. See also FINRA Code of Arbitration Procedure for Customer Disputes Rule 12508(c) ("In making any rulings on objections, arbitrators may consider the relevance of documents or discovery requests and the relevant costs and burdens to parties to produce this information."), and SEC Release No. 34-62584, concerning the previous round of proposed changes to the *Discovery Guide*, which states that "FINRA believes the discussion [of cost and burden of production and alternative ways to facilitate discovery] will help arbitrators to balance the parties' discovery needs with the need to keep the

arbitration process expeditious and cost effective." 75 Fed. Reg. 45685, 45686 (July 28, 2010).[1]

The proposed *Discovery Guide* addition identifies several distinguishing characteristics of product cases, including that "[t]he product at issue is more likely to be the subject of a regulatory investigation," and "[t]he same documents may have been produced to multiple parties in other cases involving the same security or to regulators." The proposed language in the amendment should clarify that this discussion is not intended to sanction "shortcut" discovery requests that simply request a firm's or associated person's production in other cases or its production in response to regulatory requests. Discovery in each arbitration should be restricted to what is relevant to the particular facts and the elements of the claims and defenses in the case. Regulatory requests may be wide-ranging and cover multiple subjects beyond the investment product at issue in an arbitration, and the scope of discovery that is available to an arbitration claimant should not be coextensive with the scope of discovery in regulatory matters. Moreover, the production of documents to a regulator does not necessarily void their confidentiality or waive any applicable privilege or other protection.

For the same reason, the amendments should clarify that the list of types of documents "parties typically request" in product cases should not be the touchstone for what is relevant, and therefore discoverable, in a particular case. As the Commission's Release No. 34-69761 notes, the stated product types are "general guidelines," that is, they are a factor to be considered, along with the specific facts, claims and defenses in a particular case.

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[1] See also New York State Bar Association, Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations at 11 (unanimously approved by the Executive Committee and the House of Delegates of the New York State Bar Association in April 2009): "Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award."

This approach is consistent with the growing recognition in the courts of the importance of proportionality in discovery. See, *e.g.,* Federal Rule of Civil Procedure 26(b)(2)(C)(iii): "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." See generally The Sedona Conference Commentary on Proportionality in Electronic Discovery (Jan. 2013), available at www.thesedonaconference.org.

Finally, while listing the circumstances that tend to characterize product cases, the amendments recognize that parties may disagree about whether a case should be considered a "product case." We believe the amendments should recognize more explicitly that the presence of some or all of the enumerated characteristics may not justify a threshold finding that "one or more of the asserted claims center around allegations regarding the widespread mismarketing or defective development of a specific security or specific group of securities." For example, it may appear from the allegations or other documents that the transaction was unsolicited, or that the claimant customer had other experience with the securities product, casting doubt on whether there is a *bona fide* product case even though one or more enumerated factors is present.

Affirmations. The *Discovery Guide* provides for affirmations when a party indicates there are no responsive documents in the party's possession, custody, or control. Under the proposal an affirmation would be required "[i]f a party does not produce a document specified in a List item on the applicable Document Production List, upon the request of the party seeking the document that was not produced." The proposal wisely does not disturb the distinction in this provision between documents specified in the *Discovery Guide* Document Production Lists--as to which a request from the party seeking the document is sufficient to trigger the requirement to provide an affirmation--and documents sought by an additional document request--as to which only an arbitrators' order will give rise to an obligation to provide an affirmation. We support maintaining this distinction. The Production Lists are the product of considerable thought, debate and analysis, of notice and comment, and of SEC review. Additional document requests propounded by parties are not so vetted. There is a potential for abuse of the affirmation requirement if the arbitrators do not act as gatekeeper.

We are troubled by the prospect that application of the affirmation requirement to instances of "partial production" could result in affirmations being required in virtually every case as to virtually all requests--whenever the requesting party believes (for good reason or not) that a responsive, non-privileged document has not been produced. We support the addition of language confirming that is not the intent of the amendments.

Premature, anticipatory changes to FINRA arbitrator training materials. Finally, we note our concern that changes to FINRA's arbitrator training materials should not run ahead of rules changes, thereby effectively usurping the SEC's supervisory function. This has occurred with respect to FINRA's proposed addition to the *Discovery Guide* concerning product cases. FINRA's online arbitrator "Discovery, Abuses and Sanctions" training module already includes the suggestion that production of "a firm's due diligence materials, sales literature and sales training materials" "may or may not" be appropriate in arbitrations concerning "non-conventional investments," *i.e.,* product cases.

Thank you for considering our comments on this rule filing.

Sincerely yours,

John R. Snyder

Matthew C. Applebaum